

**Fair Political Practices Commission
Memorandum**

To: Chairman Getman, Commissioners Downey, Knox, and Swanson

From: John W. Wallace, Assistant General Counsel
Luisa Menchaca, General Counsel

Subject: Adoption of Amendment to the Rulemaking Process -- Regulation 18312.

Date: January 6, 2003

I. PROCEDURAL HISTORY

- At the October 2002 Commission meeting, the Commission considered the proposed regulation calendar for 2003. In the same memorandum, Commission staff proposed that in light of the current financial situation, the number of meetings that are used in connection with the adoption of regulations be reduced by the Commission. The Commission directed staff to return with a regulatory proposal to allow staff greater flexibility in determining which special circumstances warranted additional public meetings.
- In December 2002, the Commission considered (at a pre-notice hearing) actual regulatory language. The Commission rejected the introduction of a new streamlined approach, but chose rather to modify the existing regulation to deal with specific problems in the current process.

II. BACKGROUND

On March 6, 1991, a superior court determined that the Commission was not subject to any provision of the Administrative Procedure Act (the "APA") that was not in effect at the time the voters adopted the "Act" on June 4, 1974. The court interpreted section 83112 of the Act to be a specific reference to the provisions of the APA as they existed in former Government Code, Title 2, Division 3, Part 1, Chapter 4.5, Sections 11371, et seq. (copies attached) at the time the Act was adopted.

The court also found that the Commission exceeded its statutory authority by adopting then-existing regulation 18312, because the regulation required the Commission to comply with later enacted provisions of the APA. Consequently, the court invalidated then-existing regulation 18312 as inconsistent with section 83112.

In support of this conclusion, the court observed that the voters, in adopting the Act in 1974, created an independent agency with broad powers to bring ethical reform to the political process. The provisions of the Act were not intended to be subject to constant modification by amendment to referenced statutes, such as the APA. Moreover, the court concluded that it was not

intended by the voters that the Commission's regulatory power be controlled by another state agency headed by a partisan appointee.

There are several significant differences between the APA as it existed on June 4, 1974, and the current obligations imposed by the APA on other state agencies. Some of these differences are as follows:

- Under the 1974 APA, regulations were required to be consistent with the statute which the regulation interpreted or implemented. This same requirement exists under the current APA. However, under the 1974 APA, there was no provision permitting another administrative agency (OAL) to evaluate consistency and approve or disapprove a regulation based on this analysis. Thus, the issue of consistency, under the 1974 APA, was an issue for the courts to determine.
- In addition, the 1974 APA did not require the submission of any specific documents by the Commission, other than the express language of the regulation (or an informative summary) and a statement of authority.
- Under the 1974 APA, a notice of Commission action on a regulation must be provided 30 days prior to the action. Under the current APA, a 45 day notice-period is required.
- The 1974 APA requires that notice be provided in more ways and to more entities (such as publication of the notice in a trade publication and filing of the notice with the Rules Committee of each house of the Legislature) than currently required under the APA.
- The documents required in a notice of Commission action on a regulation under the 1974 APA are fewer. For example, under the 1974 APA, the notice must contain a statement of the time, place and nature of the proceedings; a reference to the authority under which the regulation is proposed and a reference to particular code sections or other provisions of law which are being implemented. In addition, the Commission may include the express terms of the regulation or an informational summary of the proposed action.

Thus, current regulation 18312 is a codification of these 1974 statutory provisions.

III. DISCUSSION OF PROPOSED AMENDMENTS

Section 18312(b) sets out the Commission procedure for adopting, amending and repealing regulations pursuant to the June 4, 1974 APA. The provisions also provide a general description of internal Commission policy and procedures pertaining to regulatory action, such as pre-notice hearings which are a mechanism of the Commission's creation. In addition, the regulation discusses the method currently used in the case of regulations that are continued to later dates. The proposed draft has three significant amendments to this section.

Decision 1 presents the policy issue of whether the Commission wishes to continue utilizing an "interested persons" meeting as a part of the rulemaking process and whether these meetings should be expressly set forth in the regulation. The current rule does not prohibit such

meetings, but does not specifically mandate them either - it is simply silent. At the December Commission meeting, the Commission directed staff to codify the concept of interested persons meetings. This has been done at Decision 1. Additionally, textual changes have been made to the draft language clarifying the nature of the meeting and the way in which the meeting will be advertised. These changes will allow electronic mail notice of these meetings.¹

Decision 1 staff recommendation: We recommend adoption.

Decision 2 pertains to pre-notice hearings. At the December Commission meeting, the Commission directed staff to retain the existing language describing pre-notice hearings. In addition, amendments to the draft language have been made to clarify the discretionary nature of the hearings and staff's role in deciding if such meetings are necessary.

Decision 2 staff recommendation: Staff recommends adoption of decision 2.

Decision 3 would amend subdivision (b)(4). Proposed subdivision (b)(4) deals with the familiar problem of late filed written comments. On occasion, written comments have been submitted so late (i.e., close to or even after the start of the meeting) that the Commission was not able to consider these before the vote. This proposed provision would simply put into regulatory form a reasonable limitation as to how late written comments may be filed. The section would not impact oral comments at the hearing.

There are two *subdecisions* in this section, **Subdecision 3A** allows the Commission to either set a deadline that falls at noon on the preceding business day, or at 5:00 the preceding business day. Obviously, the deadline selected should be the one that the Commission believes gives both staff adequate time to circulate the letter and the Commission adequate time to review and consider it in connection with the Commission meeting. **Subdecision 3B** allows the Commission to limit the application of this rule to adoption hearings as suggested at the December meeting by Diane Fishburn.

Decision 3 staff recommendation: Staff recommends inclusion of the proposed language in subdivision (b)(4) and recommends 5:00 p.m., the close of business on the preceding business day. Staff has no recommendation on limiting the application of this rule. On the one hand, a consistent rule would be the easiest to implement. It would avoid the determination of whether a given item is a "pre-notice" item versus an "adoption" item before deciding whether the comment letter should be accepted or considered. Another factor that argues against the inclusion of a limit to this rule is that in cases where the item is being discussed as a pre-noticed item, application of the rule creates no harm. The comment will simply be resubmitted after the pre-notice hearing to be considered before adoption. These factors suggest that a universal rule applicable to all meetings and all agenda items may be the preferred method.

¹ The same modification has been made at other locations and is indicated by strikeout or underscore. We have also made two other clarifying changes where the word "notice" was used in a manner different than that defined in the regulation. We simply substituted the word "announcement" for this less formal form of notification.

Decision 4 would add new subdivision (b)(6). This subdivision again reflects the current rule that at any meeting the Commission may direct staff to hold additional interested persons meetings, pre-notice hearings, or adoption hearings on any given item.

Decision 4 staff recommendation: Staff recommends the inclusion of subdivision (b)(6).